IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

ADDITIONAL BRIEF OF RESPONDENT.

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Preliminary.

The Petition for Certiorari having been granted, we understand it to be our privilege to present an additional Brief. At the same time we stand upon those portions of Respondent's Brief, hitherto filed in this proceeding, for the Statement of Facts therein set forth and the more comprehensive citation of decisions. We ask the Court to consider both Briefs filed by respondent.

I.

The Propriety of Directing the Verdict.

The Circuit Court of Appeals for the Seventh Circuit has decided in this case that the Trial Court should have directed a verdict for the defendant (respondent here).

The reason given was that, after a painstaking analysis of the record, *no evidence* could be found upon which a rational inference could be drawn that the alleged act of negligence *was the cause* of the injuries to plaintiff's intestate.

First the Circuit Court of Appeals had found that the evidence was overwhelming against plaintiff's contention that the failure to ring the bell, under the circumstances of this case, was negligent. (Rec. 302-3.) However, it was stated by the Circuit Court of Appeals that it believed that under two recent opinions of the Supreme Court, *Seago, Admx.* v. *New York Central R. R. Co.*, 315 U. S. 781, and *Tiller, Executor, etc.* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444, there was little room for doubt but that the rule now was that any proof of negligence, however slight, is sufficient to present a jury question; that for this reason said Court was not prepared to hold as a matter of law that there was no negligence. In this respect the Circuit Court of Appeals was considering the *Seago* and *Tiller* cases as a mandate to depart from the time-honored rule in the Federal Courts that the "scintilla rule" is not followed, and that "substantial evidence" is required to make a case for a jury.

Gunning v. *Cooley*, 281 U. S. 90, 50 Sup. Ct. 231;
Peoples Savings Bank v. *Bates*, 120 U. S. 556, 7 Sup. Ct. 679;
Southern Pacific Company v. *Pool*, 160 U. S. 438, 16 Sup. Ct. 338;
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Having found that there was a slight evidence of negligence, despite overwhelming evidence to the contrary, the Circuit Court of Appeals in this case then stated:

"However, assuming there was negligence in this respect, that alone was not sufficient to take the case

to the jury. * * * The requirement in this respect is stated in *Atchison, T. and S. F. Ry. Co.* v. *Toops, Administratrix*, 281 U. S. 351, 354: 'But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. *The negligence complained of must be the cause of the injury.*' "

The Court thereafter said:

"We have carefully studied the arguments of the parties as presented in their briefs, as well as all the testimony contained in the record, and are forced to the conclusion that no rational inference can be drawn that the failure to ring the bell was the thing which resulted in the unfortunate accident. Before such inference can be indulged, there must be proof supporting a reasonable theory that his death was occasioned by failure of the defendant to warn him of the train movement. Numerous theories are advanced in an effort to explain the deceased's presence beneath the wheels of the train. All of them are highly speculative."

In short, when the Circuit Court of Appeals came to the question of "proximate cause", it ran into the situation that this record is completely barren of evidence, so that not even a scintilla of evidence can be discovered showing that the failure to ring an engine bell was the cause of the injury. Both plaintiff and defendant, in their arguments, have advanced theories which are no more than conjectures or guesses as to what might have been the cause of Tennant's death. Any jury, judge or attorney, who undertakes to say what caused Tennant's death under this record, is guessing.

This Court long ago, in determining the rules for the securing of a fair trial by jury, has said in an unbroken line of decisions, that where the issues can be determined only by resort to conjecture, speculation or guesswork, then the Trial Court shall take the case from the jury as a

matter of law. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391; *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275; *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 50 Sup. Ct., 281; *Brennan* v. *Baltimore & O. R. Co.*, 115 Fed. 2d 555 (Certiorari denied, *Brennan* v. *B. & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614); *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d 248 (Certiorari denied, *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187). The decisions following this rule are legion.

What was it necessary for plaintiff to prove in this case? The issues in this case are now confined to one narrow specification of negligence, charged in the Amended Complaint, that defendant had promulgated for use in its East Peoria yard its Rule 30, that the engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents; that while Harold C. Tennant was working as a member of a switching crew in said East Peoria yard, the defendant violated this rule, *which said violation was the cause of Tennant's injury.* There are no broad issues of general negligence in this case, nor is the question whether defendant furnished a safe place to work before this Court; nor were such charges of negligence alleged. We are limited here to inquiring whether, (First) there was any substantial evidence that this rule was promulgated for the benefit of Tennant in the East Peoria yard, and whether the same was violated; and, (Second) whether the failure to ring a bell has been proved to be the cause of Tennant's injuries.

We do not believe that the well considered decision of the Circuit Court of Appeals, in resolving this question in behalf of the defendant, should be set aside because of economic reasons. We do not believe that every case instituted under the Federal Employers' Liability Act must be

determined by a jury, whether evidence has been presented or not. It is not one of the elements of a trial by jury, as guaranteed by the Seventh Amendment to the Constitution, that the trial should be solely by juries, but rather by court and jury, as noted by Mr. Justice Roberts in his dissenting opinion, joined in by Mr. Justice Frankfurter and Mr. Chief Justice Stone, in *Bailey* v. *Central Vermont Ry.*, 63 Sup. Ct. 1062.

The view stated by Mr. Justice Roberts finds ample precedent. Blackstone, in describing trial by jury as the glory of the English law, explains that the trials were conducted by judge and jury together, with the Court having the right to withdraw issues from the cognizance of the jury as matters of law upon demurrer to the evidence. Commentaries on The Laws of England, Blackstone, 2d Edition, Book III, Page 371. Justice Story, in 1813, stated in the case of *Young, et al.* v. *Black*, 7 Cranch 565, that a demurrer to evidence is allowed or denied by the Court in the exercise of a sound discretion under all the circumstances of the case. In 1850, in the case of *Parks* v. *Ross*, 11 Howard 362, when defendant's counsel had requested an instructed verdict, this Court said:

> "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the Court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. * * * Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules."

In *Pleasants* v. *Fant*, 22 Wall. 116, decided in 1874, this Court, commenting upon the right to direct a verdict, discussed *Parks* v. *Ross* (*supra*); *Schuchardt* v. *Allens*, 1

Wall. 359; and *Improvement Company* v. *Munson*, 14 Wall. 448; and said that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the onus of proof is imposed. The Court went on to say:

> "It is the duty of a Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of the trial. * * * In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. * * * Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

The principle that the Courts have the right to direct a verdict, or to set aside a verdict, has been consistently maintained by State and Federal Courts since the time of the foregoing decisions, and may be considered an integral part of our system of American jurisprudence. It is apparent that it is not the right of every plaintiff, regardless of sufficiency of the evidence produced, to have his cause submitted to a jury, nor is this the true concept of the right of trial by jury, either under the British common law or the decisions of our American courts. And indeed, under the Federal Rules of Civil Procedure, as promul-

gated by our Supreme Court, the right to move for a directed verdict, or for a judgment notwithstanding the verdict, has been preserved and still stands unabridged. Rule 50, Title 28, Sec. 723-c, United States Code Annotated.

II.

Insufficiency of the Evidence to Warrant Submission to the Jury.

A.

The Question of Defendant's Negligence.

The Circuit Court of Appeals has said that the evidence is overwhelming that there was no practice in defendant's East Peoria yards to ring engine bells for the purpose of warning switchmen not known to be in a position of danger. Under the limited charge of negligence in this case, it was incumbent upon plaintiff to prove that Rule 30, requiring a bell when an engine was about to move, was promulgated in the East Peoria yards for the benefit of an employee working in the capacity of Tennant at the time of his fatal injuries. It is an established proposition of law that the mere proof of a rule is insufficient. It must likewise be proved that said rule was in force for the protection and benefit of the particular employee. *Chesapeake & Ohio Ry. Co. v. Mihas*, 280 U. S. 102, 50 Sup. Ct. 42; *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218, 46 Sup. Ct. 495; *Thompson v. Downie*, 78 Fed. 2d 487; *McClellan v. Pennsylvania R. Co.*, 62 Fed. 2d 61; *Central Vermont Railway v. Sullivan*, 86 Fed. 2d. 171; *Norfolk & W. Ry. Co. v. Gessaine*, 144 Fed. 56.

In *Chesapeake & Ohio Ry. Co. v. Mihas* (*Supra*), where a failure to give a warning signal was urged as the act of negligence, this Court said:

"If there was a violation of duty, therefore, on the

part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation, unless that duty or obligation was one owing to the complainant."

Likewise it is the rule of this Court that the failure to ring bells in railroad yards is not a dangerous practice *per se*. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Toledo, St. Louis & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

The evidence produced by plaintiff to establish that Rule 30 was promulgated in the East Peoria yards of defendant for the benefit of plaintiff's intestate was as follows:

One witness was called: Sheldon Harkless, foreman of Tennant's crew, no longer in service, who admitted he was "sore" at the company. (Rec. 73-74.)

He said that Rule 30 was in the book of rules of the defendant. (Rec. 59.)

He said that the rule was in effect on July 12, 1940, but failed to say that it was in effect in the East Peoria yards of defendant. (Rec. 61.)

He admitted that it was not the practice in the East Peoria yards to ring engine bells when couplings were being made, or when the engine was pulling back to slack the cars. (Rec. 80-81.)

He admitted that the custom and practice of his own crew, in pulling cuts out of track B-28 on nights prior to July 12, 1940, was that the engine bell was not rung, except "to warn other crews of engines—of other engines—and pedestrians around, yard clerks". The members of his own crew, he stated, "knew all about the movement." (Rec. 83-84.)

He admitted on cross-examination that Tennant's duties

required him to see that the switches were lined up so the train movement could go out on track 28 and get onto the lead, and that the other duty was to keep alert and look out for his own safety. (Rec. 80.)

Thereafter the defendant placed on the stand its Assistant Superintendent, who testified that Tennant was an experienced switchman, and that he had been twice instructed that Rule 30 was to be considered in conjunction with Rule 32, prohibiting the unnecessary use of either the whistle or bell, also that bells would not be rung in the East Peoria yards for the purpose of warning crew members, unless the engineer knew such crew member to be in a position of danger and oblivious to the train movement. (Rec. 117-122.)

Not only the Assistant Superintendent, but the night general yardmaster, the assistant yardmaster, four engineers and two foremen, all of long experience, together with the remainder of the members of Tennant's own crew, all testified to the effect that the rules, as promulgated for use in the East Peoria yards, did not require the ringing of a bell when an engine was about to move, unless the engineer of the crew knew that some crew member was in danger; that the custom and practice of switching in said yards was that bells were only rung to warn pedestrians, yard clerks and others (not members of the crew since they were familiar with the movement), but never to warn members of the crew unless he was known by the engineer to be in danger. (Rec. 140-237.)

There was no evidence whatever that the engineer knew Tennant to be in danger at the time of the fatal movement of the engine. On the contrary, engineer England testified that on all previous nights, when Tennant worked with his crew, the latter would make the first coupling on track B-28, after which he would walk around the north end of the engine, and later when the cut pulled out onto the

lead, Tennant would always be found standing by the B-41 switch; that this was the routine thing on all previous nights that Tennant worked as a member of his crew. (Rec. 198-9.) On the night in question, after Tennant had walked around the north end of the engine, England did not consider him a "missing man". He thought that Tennant had gone out to the 41 switch. (Rec. 213.)

About 75% of Ternant's work was in the East Peoria yards, and he had worked with this particular crew on various occasions during the preceding four months. (Rec. 123-124.) He had worked at different times with all the engineers and foremen, who testified for defendant in this case, and they have stated that during such times it was not the custom and practice to ring bells in the East Peoria yards to warn crew members, unless they were known by the engineer to be in danger.

A study of the record should convince this Court that there was no custom and practice of ringing bells in the East Peoria yards of defendant every time an engine was about to move; that Rule 30 was qualified by Rule 32, prohibiting the unnecessary ringing of bells; and as promulgated in the East Peoria yards said two rules, taken together, did not require the ringing of a bell to warn a crew member, unless known to be missing or in danger. Plaintiff has merely shown the existence of Rule 30 standing alone in the Rule Book, but has failed by any evidence to prove that it was promulgated in the East Peoria yards to warn a man performing the duties of Tennant at the time of his injury. There is not a scintilla of evidence that Tennant was relying on the bell at the time of the train movement. On the other hand, the only testimony in the record is that Tennant had been twice instructed that under the rules, as applied to the East Peoria yards, he would not be warned; that he had worked with various engineers and foremen on previous occasions in said yards,

under whom the practice and custom of switching was not to warn men performing the duties of Tennant; that Rules 30 and 32, as promulgated, did not require such a warning bell for the benefit of Tennant, and that he had been instructed in said application of rules.

The Circuit Court of Appeals for the Seventh Circuit found the evidence overwhelming against the contention that the defendant had negligently violated any obligation owing to crew member Tennant at the time and place in question.

B.

The Alleged Act of Negligence Not Proved to Be the Proximate Cause of the Injury.

The Circuit Court of Appeals has said that after a careful study of all the testimony in the record it was forced to the conclusion that no rational inference can be drawn that the failure to ring a bell was the thing which resulted in the unfortunate accident; that there was no proof supporting a reasonable theory that death was occasioned by failure of the defendant to warn Tennant of the train movement; that numerous theories had been advanced, but that all of them were highly speculative. The cause of decedent's death, stated the Court, "is shrouded wholly within the realm of speculation and conjecture." The Court quoted from several decisions hereinbefore cited in this Brief, among which was the decision in *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151, in which, on page 459, it was said:

> "In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial

support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough."

What is the state of the record? Plaintiff put on one sole witness, Harkless, who said that at the time of the accident he was twenty car-lengths, or 800 feet away. (Rec. 79.) He did not know of his own knowledge how Tennant was injured. (Rec. 87.)

Harkless said that after the cars had all been coupled together on track B-28 he gave a back-up signal to the engineer; that on straight tracks, such as B-28 in the East Peoria yards, the foreman usually signaled direct to the engineer, so that there was no necessity of relaying the signal through Tennant. (Rec. 85.) That at the time he gave the signal he did not see Tennant any place (Rec. 80); that if Tennant had been standing at the side of the engine, Harkless could have seen his light; that the hand-holds on the footboard of the Diesel engine were in good condition. (Rec. 86.) Tennant's duties, he said, were to be there with the engine to line switches out when they pulled out of the track; that he had two duties to perform, one of which was to see that the switches were lined, and the other was to keep alert and look out for his own safety. (Rec. 80.)

Later Harkless testified that following the accident they discovered the body outside the west rail at B-28 switch; that the head and right hand were missing; that about seven or eight car lengths south of the switch the right hand and lantern were found, together with Tennant's cap. There was a pool of blood outside the west rail. (Rec. 56-8.)

The plaintiff rested on this evidence as to the cause of the accident. No additional testimony was offered. The Court will note that there was no evidence offered by plaintiff as to where Tennant had located himself or what he was

doing just prior to the train movement. It is obvious that he was not down at the switches to see that they were lined, and that he had not proceeded up to B-41 switch, as had been his previous custom. He was not standing beside the engine, outside the rails in a position of safety, because his lantern was not seen by Harkless. There was no evidence upon which a presumption could be based that he was performing his duty of keeping alert and looking out for his own safety. In short, plaintiff's case is barren of any evidence, except to the effect that Tennant was run over by this train and that plaintiff's witness did not know how it happened.

Defendant put on the other members of Tennant's crew. None of them saw the accident and none of them knew how it happened. Cole, the fireman, did not know how Tennant was killed. He had heard no shouts or outcries of any kind. (Rec. 218.) Bonner, fieldman of the crew, was at the other end of the cut, near Harkless. At the time of the train movement he did not see anything of Tennant, nor did he see his light. (Rec. 232.) He said that Tennant's duties were to attend to the switches and protect the engine,—also to take care of himself. (Rec. 231-2.) Bonner said that he was performing his own duties and that he assumed Tennant was performing his. (Rec. 233.) Bonner did not know how Tennant was killed. (Rec. 234.)

Engineer England testified as to coupling all the cars together on track B-28. Tennant had made the first coupling. After the cars were all together he saw Tennant standing alongside of the cab, putting his raincoat in a box underneath the cab window. He put his raincoat in the compartment and got his cap and jacket, put them on, and walked around the north end of the engine, and that was the last England saw of him that night. (Rec. 194-6.) England said Tennant's duties were to go out on the lead

and find whether the switch was lined for them, but that when Tennant went around the engine he walked out of England's vision. England continued to look south along the west side of the train for signals. (Rec. 197.) England stated that on all previous nights, after they had coupled up the first car, Tennant would walk around the north end of the engine in just the same way, and that when the engine would pull up on the lead track over 41 switch, Tennant was always found at that point. (Rec. 199.) When Tennant had walked around the engine on the night in question, England did not consider him "a missing man", but thought he had walked down to the 41 switch.

England testified that after Tennant walked around the north end of the engine there was a ten minute wait, during which time he continued to look south along the west side of the train for signals. He finally got the signal and reversed the train in a northerly direction out onto the lead and over the 41 switch, at which place he expected to get a signal from Tennant, but did not get it. The movement that night was performed substantially in the same manner that it had been performed on previous nights. (Rec. 197-8.)

England further testified that before he started his engine he looked and did not see any one on either the front or rear footboard of his engine, but that Tennant did not ride on the footboards, but generally walked away down to the switches.

Plaintiff had introduced no evidence as to the habits of Tennant as being a careful man. On the other hand, defendant introduced the testimony of Burch, Assistant Yardmaster, who testified that on previous occasions he had noticed Tennant had a habit of sitting up on the pilot of the engine; that he would climb up on the front end of the engine onto the pilot beam, which was a high perch, and where a man might slip in getting up or in getting

down. This was an unusual and improper place for a man to sit. (Rec. 173-5.)

Harkless had testified that switchmen sometimes walked around a train for some purpose and then climbed back through the cars to get on the side where signals were being given. (Rec. 86.) He also admitted that it was not proper for a man to sit on the top of the drawhead of the Diesel. (Rec. 86.)

Assistant Superintendent Keeler had examined the scene after the accident and found Tennant's right gloved hand between the rails of track B-28, with the lantern still burning and the handle of the lantern about one inch from the fingers. (Rec. 137-8.) He had examined the footboards and the hand-holds and found them all to be in good condition. He inspected the wheels of the cars and on the *outside rim of the north wheel of the third car from the engine he found a bit of flesh.* He found no evidence of blood on any of the wheels of the Diesel or on the first or second car. (Rec. 138.)

This constituted all the evidence in the record as to the cause of Tennant's death. There had been no eyewitness. Tennant was an experienced switchman, knew all about the proposed movement of the train, and in particular knew that it would move when a signal was given by the foreman at the other end. According to his instructions and experience in these yards, he knew that no bell would be rung to warn him. There is no evidence that he had notified the engineer or any other member of the crew that he expected to go into a position of danger. Every one thought that he was attending to his duties and looking out for his own safety. Nor did the engineer have any thought that he was in danger or missing. Plaintiff's witness Harkless has testified that the bell was not rung by his crew either in coupling up cars or slacking or pulling

the cars out onto the lead, except when it became necessary to warn other engine crews, pedestrians or yard clerks. His own crew members knew all about the movement. (Rec. 83-4.)

Where Tennant was and what he was doing when the engine moved remains a mystery. Plaintiff has sought to raise the presumption that he was doing his duty; but the Circuit Court of Appeals held that all presumptions fail in the face of evidence to the contrary; that there is no dispute in the evidence but that the deceased was not in the performance of duty at the time of his death, nor relying upon a bell. (Rec. 306.)

The performance of his duty would have required that Tennant proceed ahead of the engine down to B-41 switch, to see that all switches were lined, in which event he would have been safe, or if he elected to remain with the engine he could have stood alongside it, outside the rails, where he could have been seen and also where he could see the signals which were being given, in conformity with the requirements of Rule 702 (Rec. 117); or he could have stood upon the footboard, where there were safe hand-holds. (Rec. 86.) Under this record he did none of these things. *Instead, plaintiff's counsel insist that he was standing between the rails, out of sight of the other crew members, only a few feet north of the engine.* This is only a conjecture by plaintiff's counsel, but it constitutes an admission that Tennant had elected not to remain in a safe place, but to stand in a spot of peril, without any orders or instructions so to endanger himself. Rule 702 requires a switchman to be in position to see signals, and if this is what Tennant was doing, then he was not only violating a rule of the company established for his own safety, but was not performing the duty, as defined by Harkless, of looking out for his own safety. Moreover, if he had so es-

tablished himself, for the purpose of boarding the engine when it moved toward him from a point between the rails, he was violating the general rules of the company, prohibiting a man from standing in front of an approaching engine for the purpose of boarding the same. (Rec. 117.) Rather than performing his duties, it is an unescapable conclusion, from the facts and circumstances, that he was violating them.

Since it is impossible to ascertain from the proof in the case what Tennant was doing, or where he had stationed himself, a number of conflicting theories have been advanced:

(1) Based on his previous habits, Tennant might have been improperly sitting upon the pilot beam of the Diesel. When the engine started he might have been attempting to climb down, slipping and falling under the wheels.

(2) He might have sat down on the front footboard and dozed off (as suggested by Judge Major). If this is true, he had voluntarily placed himself in a position where he possibly could not extricate himself, whether a bell were sounded or not.

(3) He might have been standing in front of the north end of the engine, between the rails (as suggested by plaintiff's counsel), in violation of rules and in violation of his duties, attempting to board the engine as it moved toward him.

(4) He might have walked around the north end of the engine and onto the east side of the cut (which Harkless said switchmen sometimes did), then, noting the movement of the train, without the necessity of any bell warning, he possibly undertook the dangerous and forbidden thing of climbing back through the moving cars, in violation of Rule 702, so that he would be on the correct side from which the signals were being given. He possibly sought to climb back

between the second and third cars from the engine, because the north wheel of the third car bore evidence of flesh, and neither the wheels of the Diesel nor of the first or second cars bore any signs whatever.

Perhaps other theories might be evolved as to the cause of Tennant's death. However, the foregoing are all possibilities, and every one of them points to some negligent, voluntary, improper act of Tennant as a direct and proximate cause of his injury. Under these theories it is as possible as not that he knew the train was moving, without the necessity of a bell warning, and thereafter sought to do some dangerous and forbidden thing, such as climbing through the moving cars, or seeking to get on the front footboard from between the rails. It is because of this state of the record in this particular case that the salutary rule of the Supreme Court, announced in an unbroken line of decisions, applies here. As said in the leading case of *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

And in *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, this Court said:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Judge Kerner of the Circuit Court of Appeals dissented, saying that "it was a permissible inference by the jury that the failure to sound the bell was the proximate cause of Tennant's death" and that this was a jury question. He gave no facts or reasons for this conclusion.

It is easy to say that a question was for the jury, but, under the tested rules of evidence in trial procedure, we do not believe this record, when carefully studied, permits any other conclusion than that reached by Judges Major and Sparks. There simply was no proof, nor any reasonable inference, that the failure to ring a bell was the proximate cause of Tennant's death. There is no dispute or conflict in the evidence. It is undisputed that under Tennant's instructions and his experience in these yards he was bound to have known that no bell would be rung for his benefit. There was no dispute (in fact, it was testified to by plaintiff's witness Harkless) that Tennant's own crew customarily did not use the bell when coupling up cars or pulling them out onto the lead, such as the movement in question, for the purpose of warning crew members, they knowing all about the movements. There was no dispute but that he was experienced and knew all about the train movement and that this engine and cars would shortly move in a northerly direction on track B 28, upon a signal given direct from the foreman at the other end of the cut. There is no dispute but that he had voluntarily placed himself where none of the crew members could see him and where he could not see their signals, although the performance of duty would have required him to remain outside the rails where he could see said signals if he was to stay with the engine. There is no dispute in the evidence but that all his fellow crew members assumed he was performing his duties of lining switches and looking out for his own safety. There is no evidence that any one knew him to be in danger. When such a record is analyzed, this Court will see that Judge Kerner was indulging in an unsupported conclusion.

We ask that this case be decided upon its own record. It does not compare with any other cases cited by plaintiff's counsel. In all the recent decisions of this Court there has been some conflict of evidence in the particular negligence alleged. In these cases it has been known what the employee was doing at the time of the accident and the cause thereof. But in this case we say that the Court will have to guess whether Tennant was killed as a result of some voluntary negligent and dangerous act of his own, or from some other unproved thing; and in this state of the record no jury should be permitted to indulge in such guesswork or speculation.

In Conclusion.

If this Court has determined to reverse the decision below, then such reversal should be limited to the question of submission to a jury, which was the only point argued here. There were numerous other questions preserved in the appeal from the District Court to the Circuit Court of Appeals, involving the prejudicial method employed by the Trial Court in charging the jury, the giving of improper instructions, the failure to give interrogatories, as provided by the rules of this Court, the excessive amount of the verdict when tested by the decisions of this Court, the motion for a new trial. (Rec. 270-272.) These questions were not decided by the Circuit Court of Appeals for the reason that it concluded that a verdict should have been directed for the defendant. If this case should be remanded, respondent should have the right to a determination of these other points, which have not been argued in this Court.

However, we respectfully urge that under this particular record the decision of the Circuit Court of Appeals should be affirmed; that as a matter of law there is no case for a

jury; that the Circuit Court of Appeals has not decided a federal question, in conflict with the applicable decisions of this Court, but in conformity with the decisions thereof; and that the Court below has not departed from the accepted course of judicial proceedings.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,
Respondent.

BY EUGENE E. HORTON,
Its Attorney.